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Defining Empirical Frames of Reference in Constitutional Cases: Unraveling the As-Applied Versus Facial Distinction in Constitutional Law

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Defining Empirical Frames of Reference in Constitutional Cases: Unraveling the As-Applied Versus Facial Distinction in Constitutional Law*

by DAVID L. FAIGMAN**

Introduction

Early in the litigation involving attempts to desegregate American public schools, Thurgood Marshall heard about research being done by a young sociologist at Columbia University.[1] Dr. Kenneth Clark had used dolls—two pink and two brown, which he bought for fifty cents at a five-and-ten on 125th Street in New York—to demonstrate that black school children in segregated schools had lower self-esteem and more psychological problems than black children who attended integrated schools.[2] When Marshall heard about Clark's doll test he thought it "a promising way of showing injury to these segregated youngsters. I wanted this kind of evidence on the record."[3] After deciding to use this evidence, Marshall next had to decide how to frame the empirical claim he was making. There were at least two possibilities. First, the research already done and published might have provided the framework within which to understand segregation's effects. The fact that segregation was cancerous to the black communities that suffered its degradations would be demonstrated by this work. In effect, Marshall could have sought to demonstrate the psychological injuries caused by Jim Crow as a general matter, just as one might demonstrate that certain chemicals found in the

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1. RICHARD KLUGER, SIMPLE JUSTICE 315–16 (1975).
2. *Id.* at 315–18.
3. *Id.* at 316.

drinking water supply could cause cancer. Marshall might have wanted to demonstrate that these general effects had become real in the specific jurisdictions that were part of *Brown v. Board of Education.*[4] This would require having Clark or other researchers replicate the original research in the five jurisdictions that were the subject of the *Brown* litigation. The question, in short, was what was the constitutionally relevant factual inquiry under the Fourteenth Amendment? Was the Equal Protection Clause violated if segregation had injurious societal effects or did a challenger have to demonstrate that segregation caused a specific injury to him or her? This question, it turns out, arises constantly throughout constitutional adjudication, though the answers are rarely explained adequately. This is unfortunate because the frames of reference used to reconcile constitutional claims can substantially affect their outcomes.

When the five cases that constituted the *Brown* litigation reached the United States Supreme Court, the justices also displayed confusion as to the appropriate way to frame the empirical issue presented. It was unclear whether the factual claim being made by the NAACP applied to all black children in segregated conditions or only the specific children involved in the cases argued below. Marshall, following the time-honored tradition of most litigation, had introduced evidence at all five trials regarding both the general effects of segregation in society and its effects in the particular jurisdictions involved in the cases.[5] At oral argument in the Topeka case, the NAACP's Robert Carter asked the Court to abide by the district court's finding of fact that segregation had deleterious psychological consequences.[6] He told the Court that the lower court's factual findings made a reversal "necessary."[7] He argued, "If there [are inequalities] in fact, that educational opportunities cannot be equal in law."[8] Justice Hugo Black asked him whether that was "'a general finding or do you state that for the State of Kansas, City of Topeka?"[9] Surprisingly, Carter told the justices that "the finding refers to the State of Kansas and to these appellants and to Topeka, Kansas." He added, "I think that the findings

4. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954). A third possibility, highly relevant to the discussion that follows, was to demonstrate segregation's effects on the specifically named litigants.

5. *See id.* at 492.

6. REMOVING A BADGE OF SLAVERY: The Record of *Brown v. Board of Education* 131–32 (Mark Whitman ed., 1993).

7. *Id.*

8. *Id.*

9. *Id.*

were made in this specific case referring to this specific case."[10] Black was troubled by the ramifications of limiting the empirical lesson to the single case of Topeka and asked whether this meant that "then you would have different rulings with respect to the places to which this applies, is that true?"[11] Carter quickly realized his error, though in his haste to backtrack he too readily abandoned the general social science available. He argued, "[n]ow, of course, under our theory, you do not have to reach the finding of fact or a fact at all in reaching the decision because of the fact that we maintain that this is an unconstitutional classification being based upon race and, therefore, it is arbitrary."[12]

In his opinion for the Court, Chief Justice Earl Warren framed the decision around the general findings regarding segregation's effects. The Court famously quoted the three-judge district court's finding that "'Segregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'"[13] "Modern authority," the Court asserted, supported this conclusion.[14] Despite the controversy sparked by citation to the work of Clark and others, the Court's chosen frame of reference—that is, its resolution of the factual dispute as a general matter rather than case-by-case—was largely uncontroversial at the time or since. Yet, as suggested at oral argument, the Court could have chosen a case-by-case frame of reference;[15] it simply chose not to.

The history of *Brown* would have been very different if the Court had required case-by-case proof of segregation's deleterious effects. It would have required courts to consider segregation's effects case-by-case, each requiring a separate trial on the facts in each specific locale. Indeed, such a holding would have largely enfeebled the decision's guarantee of equality. In numerous other contexts, however, the Court employs a case-by-case frame of reference, with exactly the enfeebling effect avoided in *Brown*. A particularly stark example of this is the Court's decision in *Gonzales v. Carhart* ("*Carhart II*"), in which the Court upheld the Federal Partial Birth Abortion Act of 2003 ("Act").[16] In *Carhart II*, the Court rejected a facial challenge despite considerable general proof that "the Act has the effect of

10. *Id.*
11. *Id.*
12. *Id.*
13. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).
14. *Id.*
15. *See* REMOVING A BADGE OF SLAVERY, *supra* note 6, at 131–32.
16. Gonzalez v. Carhart (*Carhart II*), 550 U.S. 124 (2007).

imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where necessary, in appropriate medical judgment, for the preservation of the health of the mother."[17] The Court ruled, instead, that this fact must be proved individually for claimants in every case.[18] Like *Brown*, however, the Court utterly failed to consider what frame of reference it should use in deciding the challenge. Yet this ostensibly procedural ruling had the effect of entirely undermining the substantive right conceded to exist in *Carhart II*.

This Article explores the issue of factual frames of reference and how the Court surreptitiously manipulates the relevant frame to serve substantive objectives.[19] This manipulation entails the Court's moving back and forth between general facts and case-specific facts, what Kenneth Culp Davis referred to as legislative facts and adjudicative facts. Part I summarizes Davis's classification scheme and suggests a modification that applies to constitutional facts. Part II considers the consequences associated with choosing a particular frame of reference and demonstrates how this choice fundamentally alters the sum and substance of constitutional decisions. Special attention is paid to facial versus as-applied challenges, since this is the context in which the debate over frames of reference has played out in the case law. As made clear in this section, however, the debate over facial versus as-applied challenges is merely a subcategory of the pervasive issue concerning defining the proper frame of reference for empirical questions arising under the Constitution. Part III turns to the challenging question of how the Court should decide what frame of reference should apply in different constitutional contexts. This part concludes that the question of how to properly frame a constitutional empirical inquiry is itself a matter of interpreting the Constitution and suggests factors that might help guide that interpretation.

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17. *Id.* at 161 (citation omitted).

18. *See id.* at 168.

19. It should be observed at the outset that the concern over what frame of reference applies in particular constitutional contexts is fundamentally different from the debate sparked by Justice Scalia in *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989). In footnote six of that decision, though joined by no other justice, Scalia argued that substantive due process rights should be defined at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* In my lexicon, whether the tradition is defined narrowly or broadly, it remains a constitutional reviewable fact. Although the question of specifically what kinds of reviewable facts are relevant is a key and contentious issue in constitutional adjudication, it is, as Justice Scalia's footnote illustrates, well understood by judges and scholars. *See, e.g.*, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990). In comparison, the subject of this section appears less well understood, since the Court seems to believe that it can move seamlessly between case-specific and reviewable facts without affecting constitutional meaning.

I. Fact Classification

In a landmark article, Professor Kenneth Culp Davis identified two basic kinds of facts having evidentiary significance.[20] The first he termed "legislative facts," and the second he called "adjudicative facts."[21] This division of the empirical world into two categories was originally proposed in the context of administrative law, though this nomenclature has been adopted in many other legal contexts,[22] including in constitutional cases.[23] Although the distinction between legislative and adjudicative facts is serviceable in constitutional cases, this section sets forth a modification of this classic dichotomy and argues that a three-category taxonomy better captures the nature of constitutional fact questions. These categories are doctrinal facts, reviewable facts, and case-specific facts.

A. Davis's Legislative and Adjudicative Facts

Professor Davis divided the law's empirical world between legislative and adjudicative facts.[24] According to Davis, legislative facts are those facts that have relevance to legal reasoning and the fashioning of legal rules.[25] Adjudicative facts, in contrast, are relevant to the resolution of particular cases. Davis explained that "[a]djudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent . . . . Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion."[26] Judges typically decide questions of legislative fact.[27] Adjudicative facts, on the other hand, are usually within

20. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942).

21. *Id.*

22. The Advisory Committee Note to Federal Rule of Evidence 201(a) states the following:

> The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.

FED. R. EVID. 201(a) advisory committee's note.

23. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162 (1986).

24. Davis, *supra* note 20, at 402–03.

25. *See* FED. R. EVID. 201(a) advisory committee's note ("Legislative facts . . . are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.").

26. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 7.03, at 160 (3d ed. 1972).

27. *See id.*; *see also* Davis, *supra* note 20, at 402 (noting that the rules of evidence for finding facts that form the basis for creation of law and policy should differ from the rules for finding facts specific to parties in a particular case).

the province of the trier of fact (the jury or, if there is no jury, the judge) to decide.[28]

A key distinguishing feature between legislative and adjudicative facts is the level of decision-making at which the asserted facts are relevant. Whereas legislative facts ordinarily relate to matters that transcend individual disputes and would likely recur in different cases involving similar subjects, adjudicative facts ordinarily are peculiar to a particular case.[29] In *McCleskey v. Kemp*, for example, the petitioner claimed that Georgia's capital sentencing scheme discriminated on the basis of the race of the victim.[30] This allegation was based on an extensive and sophisticated study conducted by Professor David Baldus and his colleagues.[31] Among other things, Baldus concluded that, all things being equal, "defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks."[32] This discrimination claim was based on legislative facts, in that it was directed at the Georgia system as a whole and McCleskey offered no evidence that he personally was a victim of discrimination. As Justice Powell, writing for the Court, pointed out, "Even Professor Baldus does not contend that his statistics prove . . . that race was a factor in McCleskey's particular case."[33] Indeed, of great concern for the Court was that "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[34]

28. Professors John Monahan and Laurens Walker expanded upon the Davis dichotomy by adding a third category that they call "social frameworks." Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 563–70 (1987).

29. The reason I say "ordinarily" is that there is a basic ambiguity inherent in Davis's categories. His division of facts into legislative and adjudicative categories is based on how the fact-finder employs the particular fact. If the fact is used to resolve a particular litigation, it is, by definition, "adjudicative." This is so even though the factual issue may transcend a particular dispute, such as whether second-hand smoke causes lung cancer or silicone implants cause autoimmune disorders. Similarly, if a legislature points to a particular case to support its lawmaking—as occurred in the "right-to-die" controversy involving Terri Schiavo in 2005—this particularized fact is, by definition, "legislative." The scheme I develop in this section for the constitutional arena largely avoids this ambiguity because the generality or specificity of the factual inquiry operates as the definitional feature of my framework.

30. McCleskey v. Kemp, 481 U.S. 279, 291–92 (1987).

31. *Id.* at 286–87.

32. *Id.* at 321.

33. *Id.* at 308.

34. *Id.* at 314–15.

Legislative facts, as their name connotes, typically have broad impact across large areas of the law.[35]

How the constitutionally relevant inquiry is described, therefore, as being at either the adjudicative or legislative level, is obviously of great importance. In principle, the Constitution itself establishes what sorts of facts are relevant under its dictates. In other words, the description of the relevant factual inquiry under a particular provision of the Constitution is a matter of interpretation. In the cases leading up to *McCleskey*, for instance, the Court had indicated that substantial evidence of *systemic* discrimination would constitute an Eighth Amendment violation.[36] The relevant facts under this earlier interpretation of the Eighth Amendment, then, were legislative in character. In *McCleskey*, however, the Court stepped away from this precedent. In its new interpretation of the Eighth Amendment, the Court redefined the level of relevant fact-finding. The *McCleskey* Court said that the relevant facts under the Eighth Amendment were case specific, or adjudicative, and held that claims of systemic discrimination were insufficient to sustain a cause of action.[37]

The *McCleskey* decision nicely illustrates the profound implications that surround the decision regarding what class of fact is relevant under a particular constitutional provision. The type of fact affects what sort of proof might be proffered and, indeed, whether it is realistically provable at all. It also affects the identity of the trier of fact and the manner in which evidence is introduced into the process. Adjudicative facts are often tried to juries, offered through percipient witnesses pursuant to applicable codes of evidence, and strict rules of appellate procedure control the admission of evidence after trial. Also, when proof is in the form of adjudicative facts, prospects for success lie almost entirely with trial counsel and his or her talents. Finally, but perhaps most importantly, resolutions of adjudicative facts have limited import, since they typically bear upon only individual cases.

Legislative facts, in contrast, are tried to judges and are usually the subject of expert testimony and extensive briefing. They have broad

35. *See* Davis, supra note 20, at 402 ("The rules of evidence for finding facts which form the basis for creation of law and determination of policy should differ from the rules for finding facts which concern only the parties to a particular case.").

36. *See, e.g., id.* at 323 (Brennan, J., dissenting) ("A constitutional violation is established if a plaintiff demonstrates a 'pattern of arbitrary and capricious sentencing.'" (quoting Gregg v. Georgia, 428 U.S. 195 n.46 (1976))).

37. *Id.* at 292–93. McCleskey's alternative ground for a discrimination claim was the Fourteenth Amendment's Equal Protection Clause. The Court, however, had long required such claims to be individualized because intentional discrimination had to be proven. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

impact and usually affect large numbers of cases. Although rules of evidence might apply to expert testimony regarding legislative facts introduced at trial, much of the evidence for such facts enters through alternative corridors, ranging from legislative hearing transcripts to independent judicial research. Also, appellate courts revisit legislative fact questions *de novo*. Moreover, especially in high profile cases, courts receive considerable assistance from *amicus* briefs regarding legislative facts, often including input from highly prestigious organizations. Without question, then, and not simply at the margins, classifying the pertinent fact as either adjudicative or legislative makes a considerable difference. In constitutional cases, these differences have profound consequences.

B. A Taxonomy for Constitutional Facts

Davis's dichotomy generally describes the fact-finding that occurs in constitutional cases and it has become the established vocabulary for describing the kinds of facts that are relevant to legal discourse.[38] My approach roughly parallels that of Davis, though the constitutional arena requires refinement of his scheme. Davis's legislative fact category can be further distilled in the constitutional context into two subcategories, "constitutional doctrinal facts" and "constitutional reviewable facts." This revision turns out to have special relevance for constructing procedural rules in constitutional cases. Davis's adjudicative fact category is more clearly phrased as simply constitutional case-specific facts, since this term neatly describes the import of the pertinent findings of fact. Hence, in constitutional cases, facts assume three basic forms—doctrinal, reviewable, and case-specific. Their simplicity in form, however, belies their complexity in practice.

Constitutional doctrinal facts are advanced to substantiate a particular interpretation of the Constitution. Doctrinal facts join, and sometimes are a component of, the traditional sources of authority—the text, original intent, constitutional structure, precedent, scholarship, and contemporary values—in establishing the *meaning* of the Constitution.[39] Indeed, original intent, one of the most common bases for constitutional interpretation, is almost

38. Judge Robert Keeton has suggested the use of the term "premise facts" to describe any facts that support a reasoned decision of law or policy. Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 11 (1988).

39. *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring The Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 542–44 (1991). *See generally* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. Rev. 1189, 1244–46 (1987); Michael Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 CAL. L. REV. 551, 552 (1985).

wholly fact based. Most debates over original intent concern disagreements over historical facts, such as whether the drafters or ratifiers of the Fourteenth Amendment expected the Equal Protection Clause to invalidate segregated public schools[40] or whether the Free Speech Clause was intended to cover obscenity.[41] In addition, many arguments based on constitutional structure depend on hypotheses that might be the subject of political science or sociology. John Marshall's assertion in *Marbury v. Madison*,[42] for instance, that legislators are less likely than judges to be bound by a written constitution, is a doctrinal fact of this sort.[43] Doctrinal facts, therefore, are employed to determine or justify the development of rules or standards that apply to all similarly situated cases.

Constitutional reviewable facts embody the more generally recognized function of legislative fact-finding in constitutional cases. Courts examine reviewable facts under the pertinent constitutional rule or standard in order to determine the constitutionality of some state or federal action. Reviewable facts transcend particular disputes and thus can recur in identical form in different cases and varying jurisdictions. Under the Commerce Clause, for instance, the applicable standard asks, among other things, whether the federal law "substantially affects interstate commerce."[44] A good example comes from *Gonzales v. Raich*,[45] in which the Court determined whether Congress had the authority under the Commerce Clause to regulate the home production of marijuana. Under the applicable standard, the Court had to consider whether Congress had a rational basis for concluding that home production of marijuana substantially affects price and national market conditions for marijuana.[46] After reviewing the record and Congress's reasons for regulating, the Court concluded that "the regulation is squarely within Congress'[s] commerce power because production of [marijuana] . . . has a substantial effect on supply and demand in the national market for that commodity."[47] The Court explained that:

40. *See* Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954).

41. *See, e.g.*, Paris Adult Theatre v. Slaton, 413 U.S. 49, 104 (1973) (Brennan, J., dissenting).

42. Marbury v. Madison, 5 U.S. 137 (1803).

43. *Id.* at 176 ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written.").

44. Wickard v. Filburn, 317 U.S. 111, 128–29 (1942).

45. Gonzalez v. Raich, 545 U.S. 1 (2005).

46. *Id.* at 2.

47. *Id.*

> One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana . . . locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance.[48]

The Court concluded that Congress's judgment is "not only rational, but 'visible to the naked eye,' under any commonsense appraisal of the probable consequences of such an open-ended exemption."[49]

Constitutional doctrinal facts and constitutional reviewable facts involve factual determinations that transcend particular cases and are relevant to either the formation of a constitutional test or the application of a test to similarly occurring cases, respectively. *Constitutional case-specific facts*, in contrast, refer to factual determinations that are relevant to the application of constitutional rules in particular cases. For example, the question whether a police department "intentionally discriminated" against black police officers when hiring decisions were made based on an exam on which whites received significantly higher scores raises a case-specific fact issue.[50] Similarly, the likely consequences of Nazis marching through a predominantly Jewish neighborhood in Skokie, Illinois, would be a case-specific fact.[51]

Case-specific facts, however, operate at various levels of complexity in regard to applicable constitutional norms. For example, in *Hudson v. McMillan*,[52] Hudson, a prison inmate, claimed that defendants violated his Eighth Amendment rights when they handcuffed and shackled him and then punched him in the mouth, eyes, chest, and stomach.[53] The legal standard applicable in *Hudson* was "the settled rule that 'the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'"[54] The defendants had claimed that the Eighth Amendment was implicated only when "serious injury" occurred.[55] The Court rejected this argument, stating,

48. *Id.* at 28.

49. *Id.* at 28–29 (quoting United States v. Lopez, 514 U.S. 549, 563 (1995)).

50. *See* Washington v. Davis, 426 U.S. 229 (1976).

51. *See* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977) (per curiam).

52. Hudson v. McMillan, 503 U.S. 1 (1992).

53. *Id.* at 4.

54. *Id.* at 5 (internal quotation omitted).

55. *See id.* at 2.

> [T]he extent of injury suffered by an inmate is one factor that may suggest "whether the use of force could plausibly have been thought necessary" in a particular situation, "or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur."[56]

Hence, "[t]he absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it."[57]

No bright lines mark the boundaries between doctrinal, reviewable, and case-specific constitutional facts. Indeed, uncertainty surrounding fact-categorization arises across the entire sweep of constitutional cases. Since the procedural standards courts use depend on these categorizations, however, ambiguity in this area is a matter of some consequence. The process of determining what facts are constitutionally relevant, and what category they fall into, must be determined on a case-by-case or constitutional provision-by-constitutional provision basis. The next section explores the methods by which constitutional facts might be classified and the vagaries that attach to those ways.

C. Denominating Constitutional Facts

The three types of constitutional facts—doctrinal, reviewable, and case-specific—present very different profiles in regard to constitutional adjudication. Case-specific facts are often decided by juries and have limited precedential impact. They tend to be decided squarely within the parameters of the traditional adversarial process in which, for the most part, ordinary rules of civil procedure and evidence apply. Doctrinal facts, in contrast, inform the definition of rules and standards that apply broadly, are decided exclusively by judges, and establish binding precedent. Although the adversarial process will inform the discovery of constitutional doctrinal facts, such fact-finding cannot be limited to the talents of counsel for the parties. Finally, reviewable facts transcend individual cases, are usually decided by judges, and have substantial precedential force. Reviewable facts are likely to be heavily influenced by the traditional rules of the adversarial process—with much of the evidence for reviewable facts heard at trial—but are routinely the subject of substantial exposition by parallel means, such as amicus briefs and research by judges.

Nothing inherent in a particular constitutional fact dictates whether it is a doctrinal or reviewable fact. Categorization depends on how a particular court employs the fact, and this might only be determined in

56. *Id.* at 7 (quoting Whitley v. Albers, 475 U.S. 312, 321 (1986)).

57. *Id.*

particular constitutional contexts by subsequent case law.[58] Consider, for example, the trimester framework that was set forth in *Roe v. Wade*.[59] The *Roe* Court established two points-in-time during a pregnancy that have constitutional significance.[60] Both of these were premised on "present medical knowledge" and operated to regulate when the state's interests in maternal health and the potential life of the fetus became sufficiently compelling to support regulation.[61] According to the Court, the state's "compelling" interest in the health of the mother begins at the end of the first trimester.[62] "This is so," Justice Blackmun wrote, "because of the now-established medical fact [that] until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."[63] Blackmun ruled further that "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability."[64] He explained: "This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb."[65]

In establishing 12 and 24 weeks as constitutionally significant, the question arises as to whether the Court meant to use medical technology to establish a categorical constitutional rule or a standard that might be informed by changing technology. If weeks 12 and 24 were rule based, then changes in technology—i.e., medical advances that substantially improved the safety of abortions or moved up the time of viability—should not specifically undermine the Court's decision. A rule is a rule. But if the junctures of 12 and 24 weeks raised the reviewable facts of abortion safety and viability, respectively, then the balance established in *Roe* might be expected to change as medical technology progressed. Justice O'Connor,

58. The sometimes ambiguous character of constitutional facts complicates the task of establishing a rational constitutional-fact jurisprudence, but it is not fatal to that effort, and this level of uncertainty is not unknown in constitutional cases. Consider, for example, the longstanding debate over whether the *Miranda* rule was constitutionally mandated or a judicially enacted remedy that could be revisited by legislative majorities. This ambiguity remained in the law for more than thirty years. *Compare* Miranda v. Arizona, 384 U.S. 436 (1966) (setting forth the now-famous "Miranda warning," but leaving open the question whether it was constitutionally based), *with* Dickerson v. United States, 530 U.S. 428, 444 (2000) ("Miranda announced a constitutional rule that Congress may not supersede legislatively.").

59. *See* Roe v. Wade, 410 U.S. 113, 163 (1973).

60. *See id.* at 162–64.

61. *Id.* at 163.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

for instance, read *Roe* to create a standard[66] since she believed that changing technology would alter the Court's jurisprudence. In *Akron v. Akron Center for Reproductive Health*,[67] she warned in dissent that, due to recent advances in medicine, linking the constitutional framework in *Roe* to medical technology had set it "on a collision course with itself."[68] When *Akron* was decided in 1983, abortion had become safer than childbirth through approximately week 16 and the time of viability was expected to creep toward conception.[69]

The answer to whether *Roe*'s trimester framework established a reviewable standard rather than a categorical rule is revealed by subsequent case law. It turns out that O'Connor was partly correct and partly mistaken. The first trimester junction was deemed a per se rule, in which medical realities were considered largely meaningless, whereas viability has been applied throughout as a standard, in which medical realities are reviewable facts that might change over time. The *Akron* Court rejected the suggestion that changes in technology mandated postponement of the state's interest in maternal health from the twelfth week to the sixteenth week.[70] Week 12 operated as a bright-line test of when the government's interest regulating maternal health became compelling, even if the original reason for the rule had been undermined by advances in technology. Accordingly, the Court stated that despite the changed fact-of-the-matter, the "trimester standard . . . continues to provide a reasonable *legal framework* for limiting a State's authority to regulate abortions."[71] The first trimester juncture was thus interpreted in *Akron* as a rule that was largely insensitive to changing empirical knowledge. This ended when *Planned Parenthood of Southeastern Pennsylvania v. Casey*[72] rejected the first leg of the trimester framework—overturning *Akron*—and replaced it with the standards-based undue burden test.

Casey, however, retained the second leg of the trimester framework, viability, which has consistently been treated as a standard by the Court in cases following *Roe*.[73] Describing *viability* as a standard suggests that if medical technology were to change, the contour of the "right" would

66. *See* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).

67. *Id.*

68. *Id.*

69. *Id.* at 429 n.11.

70. *Id.*

71. *Id.* (emphasis added).

72. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1991).

73. *Id.* at 837.

change as well. Hence, if viability moves from 22 to 24 weeks to 10 to 12 weeks as a matter of medical fact, then the right of reproductive choice should presumably move as well. Indeed, this is one of the principal features of employing standards that depend on possibly different circumstances occurring from those that existed when the test was first set forth. It could be argued, however, that the compromise point—viability—was really chosen for certain unstated reasons, such as giving the pregnant woman sufficient time to exercise her right to an abortion. Under this interpretation of *Roe*, the test is not viability at all, but rather the end of the second trimester—24 weeks—approximately the time at which viability occurred in 1973, when *Roe* was decided. Of course, changes in technology or medical science would not affect a rule of 24 weeks. But the Court never said that the rule was 24 weeks; it said, and thereafter has maintained, that the law is "viability"—whenever that should occur.[74]

Only subsequent cases can reveal whether the test in *Roe* was the standard of "viability" or the rule of "24 weeks." If the former, then changing technology should lead the Court to contemplate an alteration in the 24-week point-in-time, whereas if the latter, then 24 weeks should remain inviolate, subject always to the possibility of it being replaced with another rule. The ostensible answer comes from *Webster v. Reproductive Health Services*.[75] In *Webster*, the Court upheld a Missouri law that, among other things, required physicians to use medically appropriate tests to determine whether a fetus was viable at 20 or more weeks of gestational age.[76] Although the Court did not discuss the issue explicitly, it effectively accepted the Missouri scheme of treating viability as a constitutional case-specific fact. After 20 weeks, the viability of every fetus was to be measured individually. In contrast, if *Roe* had stood for an inviolate rule of 24 weeks, the Missouri viability testing provision would have been invalid as a matter of law. Under *Roe*, therefore, viability is a standard and, in some situations, will even be applied on a case-by-case basis.

In the end, the decision whether to label a particular fact as doctrinal, reviewable, or case-specific, depends on what procedural path the Court wants the fact to walk.[77] Once again, the Court's abortion jurisprudence

74. *See, e.g., id.* at 835–36.

75. Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

76. *Id.* at 526. The statute provided that a 20-week-old fetus was presumed valid, so that viability testing effectively placed the burden of proof on the woman to disprove viability.

77. This is the lesson that Professors Ronald Allen and Michael Pardo draw—and advocate—in their excellent article on the law-fact distinction. The article is cited as follows: Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003).

provides a good example of the freedom inherent in classifying constitutional facts and the policy ramifications that follow from such classifications. In *Casey*, the Court ruled that regulations that impose an undue burden on the exercise of the right to a pre-viability abortion are unconstitutional.[78] The undue burden standard was operationally defined to include any regulation that created a "substantial obstacle" to the exercise of the right.[79] In *Casey*, the Court used this standard to invalidate a spousal notification provision.[80] The opinion for the Court, written jointly by Justices O'Connor, Kennedy, and Souter, treated the issue as a reviewable fact, finding that research indicated that domestic violence might occur in a small percentage of cases as a result of this notification requirement.[81] There was no suggestion that the claimants before the Court had experienced, or were in danger of suffering, violence due to the spousal notification requirement. Yet the prospect of such violence in the class of possible complainants, even if it constituted only a small percentage of cases, was enough to invalidate the law in all cases.[82]

At the same time, the *Casey* Court upheld the 24-hour waiting provision, finding the proof inadequate to conclude that such requirements unduly burden the right. But does this issue implicate a reviewable fact or a case-specific fact and, if the former, was the appropriate domain the nation or the state? In *A Woman's Choice East Side Women's Clinic v. Newman*,[83] the Seventh Circuit provided a confusing answer to this question. The district court had enjoined Indiana's informed consent law shortly after it was enacted on the basis that it would constitute an undue burden.[84] Under the Indiana law, women had to wait at least 24 hours after receiving information regarding the risks of the abortion procedure, thus necessitating two visits to the abortion provider.[85] The lower court enjoined this provision on the basis of empirical studies conducted in Mississippi and Utah that indicated that the higher costs it imposed would reduce the number of abortions performed in those states by 10 percent to 13 percent.[86] Yet, as pointed out by the Seventh Circuit, no research was

78. *Casey*, 505 U.S. at 846.

79. *Id.*

80. *Id.* at 900–01.

81. *Id.* at 892–93

82. *Id.* at 892, 894–95.

83. A Woman's Choice E. Side Women's Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002).

84. A Woman's Choice E. Side Women's Clinic v. Newman, 132 F. Supp. 2d 1150, 1151 (S.D. Ind. 2001).

85. *Id.* at 1152.

86. *Id.* at 1173.

available regarding the effect that the present requirement would have in Indiana, and the researchers had not compared the experience of Mississippi and Utah to Indiana.[87] At the same time, however, depending on how the legal question was defined, the research might not have to apply specifically to Indiana at all for the Indiana law to be invalidated on the basis of that research. In other cases, the Court had employed a national scope for determining when abortion regulations constituted undue burdens. In *Casey* itself, as noted above, the Court struck down the spousal notification provision based on general research and did not inquire regarding state-wide experience under the challenged Pennsylvania law.[88] Similarly, in *Stenberg v. Carhart* ("*Carhart I*"),[89] the Court used a national lens to view the pertinent facts when it invalidated a Nebraska law that prohibited the use of "intact dilation and extraction," or what critics have dubbed "partial-birth abortion."[90] After *Carhart I*, lower courts routinely considered the relevant level of analysis under *Casey* to be at the reviewable fact stage.[91]

In *Casey* and *Carhart I*, the national approach served the strong jurisprudential value of ensuring consistent constitutional outcomes from state to state.[92] The *Newman* court explained the Supreme Court's reasoning:

> [C]onstitutionality must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges. Only treating the matter as one of legislative fact produces the nationally uniform approach that [*Carhart I*] demands.[93]

Yet, the Seventh Circuit, after setting forth this sound explication of why the Court framed the relevant facts under the undue burden test at the national level, devoted the lion's share of its opinion to evaluating the applicability of the research to the operation of the challenged provision *in Indiana*. The court observed that "because the undue-burden approach does not prescribe a choice between the legislative-fact and adjudicative-

87. *Newman*, 305 F.3d at 689.

88. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 837 (1991).

89. Sternberg v. Carhart (*Carhart I*), 530 U.S. 914 (2000).

90. *Id.* at 921.

91. *See Hope Clinic v. Ryan*, 195 F.3d 857, 884 (7th Cir. 1999) (Posner, J., dissenting) ("The health effects of partial birth abortion should indeed be treated as a legislative fact, rather than an adjudicative fact, in order to avoid inconsistent results arising from the reactions of different district judges . . . to different records."), *vacated*, 530 U.S. 1271 (2000).

92. *Newman*, 305 F.3d at 688.

93. *Id.*

fact approaches, we think it appropriate to review the evidence in this record and the inferences that properly may be drawn at the pre-enforcement stage."[94] Based on this analysis—what essentially constituted a state level reviewable fact analysis—the Seventh Circuit reversed the district court's ruling:

> Indiana is entitled to an opportunity to have its law evaluated in light of experience in Indiana . . . . [I]t is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate. What happened in Mississippi and Utah does not imply that the effects in Indiana are bound to be unconstitutional, so Indiana . . . is entitled to put its law into effect and have that law judged by its own consequences.[95]

The logic of the Seventh Circuit's *Newman* decision is not obvious. If, indeed, this area of the law "demands" the application of a "uniform approach," then the "experience in Indiana" is not particularly relevant to the ultimate determination. It may be that the Mississippi and Utah studies were not sufficiently valid or persuasive to conclude that, on a national scale, informed consent provisions unduly burden the abortion right. But that is a very different determination than saying that the research does not apply in Indiana. Indiana's particular experience is largely irrelevant if *Casey's* national scope constitutes the applicable test.

Unfortunately, the fact-standard applicable after *Casey* became substantially more convoluted with the Court's decision in *Gonzales v. Carhart* ("*Carhart II*").[96] Without overruling *Carhart I* explicitly, the *Carhart II* Court upheld a virtually identical federal version of the state law invalidated in the earlier case.[97] Justice Kennedy, writing for the Court, "accepted as controlling here" the undue burden standard of *Casey*, so that the Act would be invalid if its "'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'"[98] Kennedy further explained that, like both *Casey* and *Carhart*

94. *Id.* at 688–89.

95. *Id.* at 692–93 (emphasis in original).

96. Gonzalez v. Carhart (*Carhart II*), 550 U.S. 124 (2007).

97. The Court asserted that the federal ban—the Partial Birth Abortion Ban Act of 2003—"departs in material ways from the statute in *Stenberg*." *Id.* at 152. None of the lower courts agreed with this conclusion and it is hard to take seriously. Whatever might be the case, it is fairly obvious that the different result in *Carhart II* is not attributable to any difference in the law, but is due to the changed composition of the Court.

98. *Id.* at 156 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1991)).

I, this challenge involved a "facial attack" on the statute, thus requiring the Court to determine whether it constitutes a substantial obstacle as "measured by its text."

The key empirical question presented in *Carhart II* was whether "the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where necessary, in appropriate medical judgment, for the preservation of the health of the mother."[99] If the Act subjects women to serious health risks, then it should be invalid under *Casey's* standard. But Kennedy asserted that the question "whether the Act creates serious health risks for women has been a contested factual question."[100] Kennedy argued that the likely health effects of the Act were subject to substantial "medical disagreement."[101] In truth, however, this so-called medical disagreement was on the level of such scientific disagreements as evolution versus intelligent design and the reality of global warming. All three lower district courts agreed that there was, at least, "a significant body of medical opinion" that the absence of a health exception carried significant health risks.[102] The "scientific" debate over this procedure was largely manufactured by Congress, which had held highly partisan hearings on the subject and then concluded that a health exception was not necessary. Nonetheless, Kennedy relied on this "uncertainty" to support his conclusion that "the Act can survive this facial attack."[103]

Kennedy stated that his view that a medical exception would not create significant health risks was primarily compelled because the Court owes "deference" to "congressional factfinding."[104] It appears, however, that Kennedy is completely confused on this particular matter. Immediately after expressing the need to "review congressional factfinding under a deferential standard," he stated that the "Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."[105] Kennedy thus believed that the Court should be deferential yet independent, a standard that offers little guidance and less rationality for future cases.

The core concern in *Carhart II* was whether banning the abortion procedure without a health exception created enough of an obstacle to

99. *Id.* at 161 (internal quotation and citation omitted).
100. *Id.*
101. *Id.* at 162.
102. *Id.* at 162–63.
103. *Id.* at 163.
104. *Id.* at 165.
105. *Id.*

constitute an undue burden. Necessarily, then, the Court had to define the affected population. The degree of burden cannot be specified without identifying *what* percentage of *what* population confronts *what* obstacles due to the law. In *Casey*, the Court had held that the spousal-notification provision was invalid because it imposed an undue burden "in a large fraction of the cases in which [it] is relevant."[106] This, of course, involves a statistical showing, and the constitutionally pertinent populations must be specified in order to define what statistics are relevant. In *Casey*, the state had argued that only about 1 percent of women would be adversely affected by the notification requirement, primarily due to fear of abuse if they were forced to notify their spouses.[107] The *Casey* Court rejected the state's definition of the relevant population, holding that the "proper focus of constitutional inquiry is the group for whom the law is a restriction."[108] Among that group (i.e., the 1 percent of all women seeking abortions who feared abuse), the Court stated that the notification requirement "will operate as a substantial obstacle to a woman's choice to undergo an abortion" in "a large fraction of the cases."[109]

In *Carhart II*, in contrast, Kennedy offered the conclusory statement that the challengers of the Act did not "demonstrate[] that [it] would be unconstitutional in a large fraction of relevant cases."[110] The "relevant cases" for Kennedy were "all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications."[111] But this makes no sense because the constitutional issue concerned whether the law constituted a substantial obstacle given that it lacked a health exception. Under the *Casey* standard that the denominator is defined by "the group for whom the law is a restriction," the lack of a health restriction would have likely produced a substantial obstacle for women who needed the procedure due to medical complications. For those presenting medical complications that indicated the need for the prohibited procedure, the lack of a health exception would likely have been unduly burdensome for a very large fraction of these cases. If, indeed, the law posed a substantial obstacle to a "large fraction" of these women, then *Carhart II* squarely contradicts *Casey*.

In the end, therefore, Kennedy concluded that the "medical disagreement" was enough to defeat a facial challenge of the federal law.

106. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1991).

107. *Id.* at 894.

108. *Id.*

109. *Id.* at 895.

110. *Carhart II*, 550 U.S. at 167–68.

111. *Id.*

He argued that the uncertainties attending the health risks created by the federal law made a facial attack unsuitable. He explained, "In these circumstances the proper means to consider exceptions is by as-applied challenge . . . . In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack."[112] The question raised by the facial challenge—whether the Act challenged in *Carhart II* creates general health risks for women seeking abortions—was a reviewable fact, just like the facts presented in *Casey* and *Carhart II*. Almost invariably, facial challenges present either doctrinal or reviewable constitutional facts since they necessarily transcend individual cases. But Kennedy is simply incorrect to suggest that medical risk can be "better quantified and balanced" in as-applied challenges as opposed to facial challenges. In fact, as demonstrated below,[113] medical risk is more typically—and more readily—assessed in populations than in individuals. In any case, as an empirical matter there is nothing inherent in reviewable facts that make them less amenable to proof than case-specific facts. Indeed, the reviewable fact Kennedy found so resistant to proof was found conclusively in the challengers' favor by three federal district courts after each held extensive hearings on the matter.

By turning the facial challenge into an as-applied challenge, Kennedy essentially transformed the relevant constitutional inquiry from an analysis of reviewable facts into a consideration of case-specific facts. Enormous constitutional consequences follow this rhetorical move, and the Court utterly failed to take them into account. Kennedy gave no consideration in *Carhart II* to the concrete constitutional implications of the Court's decision to reject a facial challenge in lieu of the availability of as-applied challenges. Indeed, the Court rarely contemplates the constitutional ramifications that attend its definition of the applicable rules or standards that it develops to operationalize constitutional principles. As in *Carhart II*, a large proportion of this matter concerns the Court's distinguishing between facial and as-applied challenges. But the decision over when to permit facial challenges is actually a subset of the more general phenomenon regarding the Court's operationalization of the Constitution. The next section turns to this foundational issue.

112. *Id* at 167.

113. *See* discussion *infra* Part II.B (discussing the inherent difficulty in assessing validity of predictions of violence in particular cases and concluding that general assessments are more easily quantified).

II. Choosing a Frame of Reference

Determining whether a constitutional provision raises factual issues, and the kinds of facts that are relevant to particular constitutional inquiries, has obvious practical significance. For instance, if systemic discrimination is sufficient to establish an Eighth Amendment violation (i.e., a reviewable fact), a substantial statistical showing will be highly relevant, if not dispositive, in the case. If, however, the complainant must show individualized discrimination (i.e., a case-specific fact), statistical demonstrations of disparate impact will have little or no probative force. In *McCleskey*, for instance, when the Court rejected the relevance of the reviewable fact of systemic discrimination in favor of a rule requiring proof of the case-specific fact of particularized and purposeful discrimination, it fundamentally altered the form of litigation. Prior to *McCleskey*, statistical proof of systemic discrimination could establish an Eighth Amendment violation. After *McCleskey*, a claimant must demonstrate that the jury, judge, or prosecutor intentionally discriminated against him or her. While establishing statistical proof of discrimination is no easy task, requiring proof of individualized discrimination in a capital case creates a nearly insuperable obstacle to overcome.

The shift in perspective in *McCleskey* transformed the litigation under the applicable constitutional provision from a general category of cases to individualized litigation. It changed the decision from an at-large determination of constitutional validity to a case-by-case constitutional assessment. The relevant fact changed from reviewable to case-specific. When the Court, however, describes the pertinent fact as reviewable, its determination of the fact-of-the-matter resolves an entire class of cases. In *Roper v. Simmons*,[114] for instance, the Court held that the death penalty could not be constitutionally applied to any defendant who had killed prior to his or her eighteenth birthday. One of the principal bases for this decision was the finding that minors are not as psychologically mature as adults and, thereby, not fully culpable for their criminal conduct.[115] Before *Roper*, a defendant's psychological development was something juries could take into account in deciding sentencing.[116] It was a case-specific fact. In *Roper*, this matter became a reviewable fact. Justice Kennedy, writing for the Court, stated that "[t]he difference between juvenile and

114. Roper v. Simmons, 543 U.S. 551, 570 (2005).

115. *Id.* at 571.

116. *Id.* at 620 (Scalia, J., dissenting) ("The criminal justice system, by contrast, provides for individualized consideration of each defendant. In capital cases, this Court requires the sentencer to make an individualized determination, which includes weighing aggravating factors and mitigating factors, such as youth." (citing Eddings v. Oklahoma, 455 U.S. 104, 115–17(1982)).

adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[117] Moreover, Kennedy observed that even though some juvenile offenders possess adult-level competency, psychologists cannot reliably identify this subset.[118] He stated, "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile offender whose crime reflects irreparable corruption."[119] Justice O'Connor, in contrast, argued in dissent "that a legislature may reasonably conclude that at least some 17-year-olds can act with sufficient moral culpability, and can be sufficiently deterred by the threat of execution, that capital punishment may be warranted in an appropriate case."[120] The relevant factual inquiry under the Eighth Amendment for O'Connor, then, would be case-specific.

As *McCleskey* and *Roper* illustrate, the kind of facts found to have constitutional relevance can fundamentally impact the scope of the constitutional interests at stake. How—indeed, whether—a constitutional fact can be proven will often turn on the way the relevant inquiry is defined, that is, as a doctrinal, reviewable, or case-specific fact. This matter has potentially profound implications, not simply for the manner in which constitutional litigation proceeds, but for the scope of protection afforded basic rights. In the First Amendment area, for instance, defining the government's interest in protecting children as a reviewable fact in child pornography cases, rather than as a case-specific fact in which local community standards would be consulted on a case-by-case basis, impacts the very exercise of the right itself. In *New York v. Ferber*,[121] the Court rejected Justice Brennan's call for case-by-case assessments of pornographic materials depicting children, and instead adopted a per se rule permitting blanket prohibitions.[122] Justice White, writing for the majority in *Ferber,* thus treated the empirical effects of child pornography as a reviewable fact and set forth a rule for all similarly situated cases.[123] As Justice Brennan pointed out, this means that, by definition, some offending

117. *Id.* at 572–73.

118. *Id.* at 573.

119. *Id.*

120. *Id.* at 600 (O'Connor, J., dissenting).

121. New York v. Ferber, 458 U.S. 747 (1982).

122. *Id.* at 773.

123. In individual cases, of course, child pornography prosecutions still present numerous case-specific facts—such as whether real children were used in the filming or whether the acts depicted qualify under the applicable statute—but these are "plain facts" which come largely unentangled with constitutional norms. Nonetheless, even plain facts have constitutional implications and thus these are a specie of case-specific constitutional facts.

materials with scientific, literary, or artistic value will be censored by *Ferber's* blanket prohibition.[124] By treating the constitutional inquiry as raising reviewable facts, the basic rule the Court devised was, as most rules are, somewhat over-inclusive. Hence, some speech that would have been covered under a scheme of case-by-case assessment will be left unprotected under the *Ferber* at-large approach.

A. Facial Versus Applied Challenges

The choice between facial and as-applied challenges is a specie of the more general question presented in constitutional cases involving the necessity of defining the frame of reference by which a case or cases will be assessed. For all practical purposes, for instance, the *Roper* Court had to choose between assessing the Missouri capital sentencing scheme on its face or as-applied. Although it did not describe the matter in exactly this way is not particularly relevant. Indeed, the Court explicitly accepted that some juveniles possessed adult-level competency; the difficulty lay in distinguishing those who do from the vast majority who do not. As-applied adjudication was possible in *Roper*, therefore, but not without considerable constitutional costs being imposed. Significantly, the Court was guided by the impracticalities associated with as-applied adjudication in ultimately invalidating capital punishment wholesale for those who killed before turning eighteen. Yet, in other cases, the Court has stated that as-applied adjudication is the default option in constitutional cases, notwithstanding the potential difficulties that might be associated with proving constitutional violations one case at a time. As this section explains, this default rule in favor of as-applied constitutional adjudication is not sound in theory or in practice.

The signature case for the asserted preference for as-applied constitutional adjudication is *United States v. Salerno*.[125] In *Salerno*, the Court rejected a facial challenge to the United States Bail Reform Act's pretrial detention provision, holding that due process does not prohibit detentions based on predictions of future violence. The Court stated that "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[126] As this statement suggests, *Salerno* sets forth a vision of constitutional adjudication in which the presumptive form of constitutional adjudication

124. *Ferber*, 458 U.S. at 776 (Brennan, J., concurring).

125. United States v. Salerno, 481 U.S. 739 (1987).

126. *Id.* at 746.

is the individual case. In particular, *Salerno* preferences "as-applied" challenges, thus conforming to romantic notions of a restrained judiciary, one that limits the Court to deciding the specific case before it. Inherent in this approach is the Court's apparent belief that the constitutional issues presented in facial challenges are the same as those presented in as-applied challenges, just many times more so. The *Salerno* rule contemplates that facial challenges are merely the sum of all of the parts of as-applied challenges.[127] *Salerno*, under this view, does not alter the content of constitutional analysis, it merely mandates that each case be considered separately and on its own merits. But *Salerno* does much more than simply uncouple constitutional challenges. It fundamentally changes the substance of the constitutional analysis in these cases. In short, constitutional reviewable facts are not simply the sum total of all of the case-specific facts that fall within the pertinent constitutional category. This is so for several reasons, including: (1) because courts discover reviewable facts in fundamentally different ways than how they discover case-specific facts; (2) because different fact-finders are charged with deciding different kinds of constitutional facts; and (3) because the transaction costs, which ought to be relevant to any constitutional inquiry, are profoundly different when the Constitution is read as guaranteeing merely retail fairness rather than wholesale fairness.

This section focuses on the first of these reasons, while the following section considers, among other matters, the second and the third. It is not at all unusual, as reflected in *Salerno*, for the Court to see no basic difference between resolving constitutional cases at the reviewable fact level and resolving them at the case-specific fact level. The choice of factual frame of reference, however, profoundly affects substantive constitutional adjudication. This was particularly well illustrated in *McCleskey*, discussed above. By holding in *McCleskey* that the proper frame of reference was whether discrimination occurred at the case-specific level, rather than at the reviewable fact level of systemic discrimination, the Court effectively rendered moot this entire class of constitutional litigation.[128]

127. *See* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1335 (2005) ("*Salerno* permits a facial challenge only in cases in which every plaintiff would win an as-applied challenge, i.e., those cases in which the government cannot validly apply the statute to anyone."); Matthew Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 154–55 (1998) ("*Salerno* says . . . the following: Given some rule R, a court should facially invalidate R only if, for every person X against whom R might be enforced, the application of R to X would be unconstitutional.").

128. *See* discussion *supra* Part I.A.

Salerno thus represents merely a case-in-point of the Court's general inattention to the pivotal consideration of framing constitutional questions. The debate over facial versus as-applied challenges is part of the larger and ever present struggle over how constitutional issues should be framed. In *Brown*, as described above, the Court had to choose between describing the relevant issue as whether, on the one hand, racial segregation caused deleterious consequences in particular school districts or, on the other hand, segregation caused deleterious consequences generally. It chose the latter course, though in its opinion it did not defend, or even acknowledge, this choice. Although the Court necessarily attends to the empirical world in implementing the Constitution, the justices seemingly have little understanding of the methodological complexities that arise in the process of measuring that world. This leads the Court to believe that as-applied challenges are functionally equivalent to facial challenges as a constitutional matter. This is demonstrably not the case.

B. *Salerno* and Why All Facts are Not Equal

The defendant in *Salerno* argued that the Bail Reform Act's use of the criterion of "dangerousness to the community" violated due process.[129] According to the defendant, the Act constituted "punishment" and was facially invalid.[130] The Court determined, however, that Congress intended the Act to be regulatory, not punitive.[131] It served the legitimate "regulatory interest in community safety."[132] But the strength of the government's regulatory interest necessarily depended on the means it had available to effectuate that interest. In particular, and central to the constitutional analysis in *Salerno*, was the matter of predicting violence. This factual issue might have been defined at either the reviewable fact or case-specific fact level. The reviewable fact would revolve around psychological professionals' ability to predict violence and, in particular, the methodological bases for the tools they use. The case-specific fact would concern the basis for individual predictions of violence in particular cases. These two frames of reference are deeply dissimilar, and the choice between them substantially affects the Constitution's meaning.

If the relevant inquiry in *Salerno* had been identified as a reviewable fact, it would have been incumbent on the Court to consider the research basis for predictions of violence in general. After all, Congress's

129. *See Salerno*, 481 U.S. at 739.

130. *Id.*

131. *Id.*

132. *Id.* at 748.

regulatory interest in non-punitive pretrial detention could not be maintained if the stated regulatory purpose of detaining the dangerous arrestee could not be achieved as an empirical matter. Indeed, despite the Court's rush to individualized adjudication, presumably if the Act prescribed the use of crystal balls to decide which arrestees to detain, the Act would have been unconstitutional on its face. In fact, many methods of violence prediction are little better than crystal balls, if better at all. Yet the Court said nothing regarding the government's claimed ability to achieve its interests of making the community safer by selectively identifying the likely-to-be-violent arrestees. The Court merely opined that "there is nothing inherently unattainable about a prediction of future criminal conduct."[133] This statement—the Court's only nod to the empirical footings that underlay the government's action—is breathtakingly inane. Presumably, the Court believed that such details would be addressed later in as-applied challenges.

By defining the frame of reference as case-by-case adjudication, the Court defined the relevant constitutional inquiry as a case-specific fact, rather than a reviewable fact. After *Salerno*, an arrestee would be obliged to demonstrate that the prediction of violence in his case was erroneous. Admittedly, this proof could include the general lack of validity of predictions of violence because if crystal balls cannot predict the future generally, they also cannot do so in specific cases. Moreover, if predictions of violence are so unreliable that they should not be permitted in any case, then arguably the case-specific fact would effectively morph into the reviewable fact and the *Salerno* standard itself would be met: "no set of circumstances exists under which the Act would be valid."[134] Hence, in theory, though it might take considerable time and resources, the government's crystal ball gazing methodology would be struck down in case after case until the Act's general validity would be undermined. But fact-finding of the reviewable or case-specific types is never so neat as all that.

What is missing when the Court ignores the relevant frame of reference is a constitutional weighing of the real costs associated with the decision. On its own terms, *Salerno* is a case of explicit balancing: "[T]he Government's regulatory interest in community safety can [sometimes] . . . outweigh an individual's liberty interest."[135] This balance must necessarily depend in substantial part on the validity of the tools the government

133. *Id.* at 751.

134. *Id.* at 745.

135. *Id.* at 748.

employs to effectuate community safety. Crystal balls would not be a reasonable means to effectuate the government interest, but a valid actuarial test might be adequate. Suppose, for instance, that the government's pretrial detention test identifies 40 percent of those who would be violent if released. This rate might be high enough to allow the government's interest in community safety to outweigh the individual's liberty interest, but it is not obviously so. If the Court is going to balance, as it purportedly did in *Salerno*, it should be obliged to identify the factors it put on the scales and at least make a showing of deliberating over their respective weights.

Yet, given *Salerno's* injunction that the statute could be applied in a constitutional manner in some cases, the 40 percent true-positive rate would seemingly be sufficient. In forty out of every one hundred cases the government would be protecting the community and would not be detaining a non-dangerous arrestee. The challenge presented by *Salerno*, of course, would come in the case-by-case adjudication of the one hundred cases in order to identify the forty correct ones. The problems with this approach are manifold, some empirical and some legal.

As an empirical matter, knowing the true-positive rate allows us to conclude theoretically that the *Salerno* standard is met, but this has no practical consequence. We may know that predictions of violence have a success rate of 40 percent, but we do not know which ones are correct. If we knew beforehand which predictions were incorrect, we could correct those mistakes in the first place. Hence, where error may be recognizable in a class of cases, it may be practically unknowable in particular cases. In a set of one hundred cases in which a prediction of violence was made, every arrestee would look alike on this variable. After all, that is how they were placed in the set in the first place—they were each detained based on a prediction of violence. As a set, we know that only forty of these predictions will be accurate, and the best that can be done is to infer a similar accuracy rate for each arrestee. Hence, the legal issue in *Salerno* cases—regarding whether community safety outweighs an arrestee's liberty interests—is only cognizable at a general level.

In fact, however, the statistical underpinnings of predictions of violence are likely to be ignored in case-by-case adjudication. Individual cases are usually litigated on the basis of the professional credentials of the parties' experts and the reasons the experts believe the arrestee to be dangerous or not. Judges are likely to have little patience for the repeated adjudication of the general empirical question of the validity of clinical predictions of violence. After all, the Court itself said that "there is nothing

inherently unattainable about a prediction of future criminal conduct."[136] A reasonable trial judge might conclude that the Court had already looked into this matter. He or she would be mistaken. The Court considered the reviewable fact largely irrelevant, since it rejected the facial challenge, thus wrongly believing that the underlying empirical issue might be adjudicated in as-applied litigation. In effect, the core empirical issue presented in pretrial preventive detention cases vanished in *Salerno's* rhetorical maneuver.

The empirical bait-and-switch of *Salerno* buried the value choices endemic to the constitutional balance the Court held to be inherent in the substantive due process analysis that it ostensibly applied. It may be, for instance, that the government's regulatory interest in community safety outweighs liberty interests when the reliability of predictions of violence exceed 90 percent. But if reliability rates were below 15 percent, the balance might swing against the government's claim. What reliability rate is necessary to outweigh the liberty interest is a matter of constitutional interpretation. This is a fact that can only be assessed at the reviewable fact level and thus the analysis should at least have to begin there—based on the Court's own statement of the Constitution's meaning. *Salerno* elides this analysis by shifting the relevant frame of reference to individual cases and the Court thus evades consideration of the true costs of its decision.

III. Defining Frames of Reference

The proper frame of reference for deciding constitutional cases should be an explicit component of constitutional interpretation. Of course, like other interpretive matters, there is no objective or definite answer to the question of what frame of reference should be employed in a particular constitutional context. The choice of frame of reference, like questions regarding the reach of "free speech" in the First Amendment or the meaning of "equal protection" in the Fourteenth Amendment, must depend on the text of the Constitution and the sundry authorities regularly relied upon for gleaning the text's meaning. In *McCleskey*,[137] then, the question whether the Eighth Amendment's prohibition on "cruel and unusual punishment" is concerned with systemic discrimination, individualized discrimination, or both, must be determined from traditional sources of constitutional interpretation. Similarly, the issue in *Roper*,[138] whether the mental competency of minors for Eighth Amendment purposes should be

136. *Id.* at 751.

137. McCleskey v. Kemp, 481 U.S. 279 (1987).

138. Roper v. Simmons, 543 U.S. 551 (2005).

measured individually or collectively, depends on the meaning of that constitutional provision. Once defined, frames of reference provide the lens through which concrete cases are adjudicated. Frames of reference give operational effect to the Constitution. The problem lies in defining the appropriate frame of reference for the constitutional task at hand.

This section does not set forth a recipe for identifying appropriate frames of reference in different constitutional contexts. There are as many frameworks to be defined as there are constitutional issues to be resolved. Nonetheless, just as certain guides to general constitutional interpretation can be identified—including the text, original intent, precedent, and so on—certain factors ought to be consulted regarding what frame of reference should be employed in particular contexts. These might include the following: (1) the empirical practicability of conducting meaningful case-by-case analyses, (2) the constitutional values at risk in failing to adopt an at-large decision, and (3) the constitutionally cognizable costs associated with at-large decisions versus case-by-case adjudication.

A. The Empirical Practicability of Conducting Meaningful Case-by-Case Analyses

A key consideration in determining whether particular constitutional challenges should be resolved at-large or case-by-case must be whether claimed violations can be effectively measured one case at a time. In *Roper*,[139] for example, the Court held that executing minors who had killed violated the Eighth Amendment's ban on cruel and unusual punishment. The basic rationale driving this judgment was that juveniles, *on the whole*, are developmentally incapable of having the mental and behavioral capacity to be fully culpable for their criminal conduct.[140] The Court recognized, however, that this empirical judgment was not absolute, for certainly some offenders younger than eighteen possessed adult-level competency.[141] The difficulty lay in reliably distinguishing one case from another. Justice Kennedy, writing for the Court, observed, "It is difficult even for psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[142]

The problem of individualizing constitutional standards is both pervasive and is a consequence of at least two separate causes, one

139. *Id.*
140. *Id.* at 572–73.
141. *Id.* at 574.
142. *Id.* at 573.

primarily empirical and the other primarily legal. First, empirically, as illustrated by *Roper*, it is very often possible to identify a general phenomenon but have little ability to determine whether any particular case is an instance of that phenomenon. Second, as a legal matter, the move from an at-large determination to a case-by-case evaluation will sometimes alter the sort of evidence that is probative of the fact in question, possibly making it virtually immune to proof altogether. I consider these in turn.

A point I have made elsewhere in the basic evidentiary context is very much applicable in constitutional cases. Specifically, the scientist's basic methodology is not well tailored to the seeming default rule in the law of individualized adjudication. A fundamental problem in the receipt of all scientific evidence is the different starting points for empirical inquiry in science and law: "While science attempts to discover the universals hiding among the particulars, trial courts attempt to discover the particulars hiding among the universals."[143] Therefore, to take a simple evidentiary example, research might demonstrate unequivocally that second-hand smoke causes lung cancer, but it might not be possible to determine validly whether a particular person's lung cancer is attributable to second-hand smoke. The general phenomenon might be very well understood, but valid diagnostic tests might still be unavailable.

Consider, for instance, a comparison of *Roper* with another death penalty case of recent vintage: *Atkins v. Virginia*.[144] In *Atkins*, the Court held that executing a mentally retarded defendant who had killed violated the Eighth Amendment's ban on cruel and unusual punishment. In reasoning later echoed in the *Roper* case, the Court concluded that mentally retarded individuals did not have the intellectual capacity to be held fully responsible for their conduct.[145] Unlike *Roper*, however, *Atkins* will be applied case-by-case.[146] Although the Court could have defined the applicable class categorically, as it did in *Roper*, it chose to permit state-by-state development of the diagnostic criteria that would meet the constitutional standard.[147] The viability of this application, then, depends on the validity of the diagnostic tests used to distinguish mentally retarded individuals from the rest of the population.[148]

143. DAVID L. FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW 69 (1999).

144. Atkins v. Virginia, 536 U.S. 304 (2002).

145. *Atkins*, 536 U.S. at 306.

146. *See id.* at 317.

147. *See id.*

148. *See id.* at 309 n.5.

Atkins, therefore, illustrates the two levels of generality at which empirical evidence might come into the courtroom in constitutional cases or otherwise. These levels are general or specific. At the general level, the empirical issue in *Atkins* concerned whether there is a group of identifiable capital defendants whose mental functioning is so deficient that it relieves them of full responsibility for their behavior in a way that it would be cruel and unusual to execute them. If there is such a group, the next issue is whether a diagnostic test is available by which it can be determined whether a particular individual is a member of this group. In *Roper*, the Court answered the first issue in the affirmative, but the second issue in the negative; in *Atkins*, the Court answered both issues in the affirmative.

The second and somewhat more basic problem associated with individualizing constitutional standards is legal in nature. Specifically, as a practical matter, the Court's rejection of an at-large constitutional challenge will often fundamentally change the nature of the proof that will be probative in the matter. A particularly clear example of this occurred in *McCleskey*, discussed above. Although the defendant introduced strong evidence of systemic bias in the pattern of capital sentences handed down in Georgia,[149] the Court held that the Eighth Amendment required case-by-case proof of discrimination.[150] Whereas it was possible to isolate the effect of race on a population of decisions using sophisticated statistical techniques, proof of particularized discrimination in this context was a practical impossibility. McCleskey's individualized claim would have possibly involved the judge, the prosecutor, or the jury in his case. Needless to point out perhaps, but the law does not afford defendants an effective route by which to discover implicit or explicit prejudice among these decision makers. Following the *McCleskey* decision, then, there was no practicable way of conducting a meaningful case-by-case analysis of an alleged constitutional violation.

B. The Constitutional Values at Risk in Failing to Adopt an At-Large Decision

Perhaps the one area in which the Court has given significant attention to the issue of frames of reference, though not in so many words, is the overbreadth doctrine of the First Amendment. In particular, the overbreadth doctrine induces the Court to take into account the consequences associated with the form of the Court's analysis. In this one area, the Court displays an understanding that form affects content.

149. McCleskey v. Kemp, 481 U.S. 279, 327 (1987).

150. *Id.* at 279–80.

Overbreadth doctrine dictates that the Court consider the effects statutes have generally on free speech, because of the prospect that "the statute's very existence may cause others not before the Court to refrain from constitutionally protected . . . expression."[151] Because of the chilling effect that a law might have on those not parties to the case, overbreadth requires that the Court analyze constitutionality in these cases at a general level of abstraction. Case-by-case adjudication, it is argued, might permit negative constitutional outcomes simply by virtue of this form of resolution.

Form affects content in most constitutional arenas. Yet the Court has not undertaken to extend its recognition of this fact outside of the First Amendment. The important point, however, is not that the Court should employ overbreadth-like analyses in every constitutional area. But it should consider the reasons why such an analysis might—or might not—be indicated and give its reasons for selecting either a general or a specific frame of reference for resolving a dispute.

Much of the Court's abortion jurisprudence appeared to parallel the reasoning that supported the at-large approach to free speech cases. Just as in the context of speech, where the mere prospect of a statute could chill a person's exercise of a fundamental right, the prospect of having to hurdle the substantial obstacles established in restrictive abortion regulations could chill a woman's exercise of her right of privacy. Moreover, requiring case-by-case adjudication, particularly in the abortion context, is inherently burdensome—and thus chilling—and leaves the prospect of having one's rights vindicated, at best, ambiguous. In decision after decision following *Roe*—which itself was an at-large, styled decision—the Court resolved constitutional disputes involving the reconciliation of the woman's right to have an abortion and the state's interest in restricting abortions at the general (or facial) level of constitutional analysis. These matters were resolved based on the reviewable or doctrinal facts of the matter, whether the woman or the state prevailed on the issue. This was true for parental notification/consent provisions, informed consent and 24-hour waiting requirements, and spousal notification provisions. In all of these cases, the constitutional value associated with the right of privacy seemed to necessitate resolution of disputed claims at the general level. Privacy, like speech, appeared to be too important a constitutional value to leave to the vagaries of case-by-case adjudication.

151. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). *See generally* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 861–62 (1991); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 694–701 (1978).

C. The Constitutionally Cognizable Costs Associated with At-Large Decisions Versus Case-by-Case Adjudication

No case better illustrates the costs associated with choosing frames of reference than *Carhart II*. As detailed above, Justice Kennedy, writing for the Court, rejected a facial challenge to the Act after determining that substantial uncertainty surrounded the issue of whether a health exception was necessary to such a ban. Importantly, however, Kennedy assumed that a health exception was probably warranted in some percentage of cases—just not "a large fraction of relevant cases."[152] But Kennedy did not contemplate the constitutional costs imposed on the fraction that would be affected by the absence of a health exception. He simply concluded that "[t]he Act is open to a proper as-applied challenge in a discrete case."[153]

Consider, however, the real costs of requiring an as-applied challenge to the Act. A proper as-applied challenge would, at bottom, involve a woman who confronted potential health complications with a second trimester abortion. The woman would have to petition a court to enjoin application of the statute to her. This would entail filing pleadings, obtaining affidavits from experts, and participating in an adversarial hearing on the merits. Although data is not available on this specific question, it seems quite unlikely that many as-applied challenges will be brought, not because they are without merit, but because the structural impediments are too great. Kennedy's opinion suggesting as-applied challenges as a bona fide alternative is either self-delusion of the highest magnitude or a crass political maneuver designed to dispose of all of these cases, notwithstanding substantial health risks created for women, without owning up to that reality.

In effect, therefore, by moving the frame of reference from an at-large determination to a to case-by-case determination, the Court made it impossible for women to vindicate a right that the Court itself said existed: the right of a woman to choose a pre-viability abortion without undue interference by the government. The Court left women without the procedural wherewithal to exercise that right. Ironically, the realities of bringing an as-applied challenge to the federal ban on "partial-birth" abortions arguably violates the Court's own undue burden standard. An undue burden was defined empirically as constituting a "substantial obstacle" to the exercise of the right.[154] Any reasonable consideration of the practical realities associated with bringing an as-applied challenge after

152. *Id.* at 167–68.

153. *Id.* at 168.

154. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1991).

Carhart II would have to conclude that the legal processes involved would create nearly insuperable barriers to such a challenge.

A basic error in the Court's approach in *Carhart II* was its failure to realistically assess the opportunity for an individual woman to vindicate her basic right to a pre-viability abortion. The Court ostensibly accepted that some fraction of women should have access to the prohibited procedure due to medical complications.[155] Yet it provided no adequate means by which this right could be effectuated case-by-case. Indeed, even if the Court is disinclined to resolve a challenge at-large, it is possible for it to seriously engage the question of how case-by-case adjudication should proceed in an effective manner. In other contexts, for example, the Court has recognized the facial validity of a statutory scheme, but mandated a procedural edifice that would ensure the efficacy of as-applied challenges. For example, in *Hodgson v. Minnesota*,[156] the Court upheld a law mandating parental consent on the basis of the state's overriding interest in promoting family cohesion. The Court recognized, however, that individual cases might depart from the sanguine view of the family held by the state.[157] In such cases, the young woman's basic right to choose an abortion might have been unduly interfered with. The Court, therefore, devised a procedural framework, the judicial bypass, that would ensure that as-applied challenges would not be superfluous. In *Carhart II*, a frank assessment of the consequences of insisting on as-applied challenges might have led the Court to either abandon this line of analysis or identify a mechanism that would have given some substance to such challenges.

Conclusion

The Court has long overlooked the issues raised when it defines the empirical frames of reference by which it evaluates constitutional cases. Indeed, the Court has long assumed that the procedural decision regarding the level of generality employed to measure the constitutionality of some action does not affect substantive outcomes. In setting forth the jurisprudential implications of the choice between facial and as-applied challenges, for instance, the Court never mentions the fundamentally different forms of empirical proof that the two demand. In a nutshell, the Court appears to assume that general challenges to a law's application are merely the sum of the many individual challenges that might be brought

155. Gonzalez v. Carhart (*Carhart II*), 550 U.S. 124, 166–67 (2007).

156. Hodgson v. Minnesota, 497 U.S. 417 (1990).

157. *Id.* at 437–39.

under the law. But even brief reflection, with just a modicum of empirical sophistication, reveals that this is manifestly not true.

This Article explores how defining facts at different levels of generality can fundamentally affect outcomes in constitutional cases. It outlines a useful taxonomy of constitutional facts—including doctrinal facts, reviewable facts, and case-specific facts—and discusses how each is distinguished from the other two. Whereas doctrinal facts are employed to define an applicable rule or standard, reviewable facts are resolved under some particular rule or standard. Hence, historical evidence might be relevant to setting "viability" as the point-in-time when states can proscribe abortions and, in this way, historical facts operate as doctrinal facts. The medical fact of when viability occurs—i.e., a fetus can survive outside the mother's womb—is a reviewable fact, one that has been found to occur around the end of the second trimester. The question of whether a particular fetus is viable or not would be an example of a case-specific fact.

Much turns on whether the Court defines the relevant inquiry as involving doctrinal, reviewable, or case-specific facts. The choice of fact affects, among other things, the nature of the proof that can be used, the practical availability of proof, the identity of the fact finders, and the standards of review that apply. Because choice of fact affects constitutional outcomes, no simple default rule—such as the presumptive preference of as-applied challenges to facial challenges—can be sensibly employed. The decision regarding what level of fact is implicated must depend on an interpretation of the pertinent constitutional provision. This ought to depend on, among other possible considerations, the practicability of conducting meaningful case-by-case determinations, the constitutional values implicated, and the constitutionally cognizable costs associated with at-large decisions versus case-by-case adjudication.

Historically, the Court has not demonstrated an impressive quotient of empirical sophistication. This deficit has led it to miscomprehend and underestimate the impact that threshold issues of fact definition can have on substantive outcomes in constitutional cases. It is about time that the Court improves this quotient, for substantive constitutional rights depend on it.

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